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Before the
Federal Communications Commission
Washington, DC 20554

Federal Communications Commission
Office of the Secretary

In re:) MD Docket No. 13-163
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Edward Paul De La Hunt) File No. BNPH-20060308AIA
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Refund of Application Filing Fee)
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Filed with: Office of the Secretary
Directed to: The Commission

APPLICATION FOR REVIEW

Edward Paul De La Hunt ("De La Hunt"), by its attorney, respectfully submits an Application for Review appealing the Letter Ruling issued by the Office of Managing Director on March 27, 2013, denying a refund of the \$2,980.00 broadcast application filing fee paid by De La Hunt in conjunction with a long-form construction permit application (FCC Form 301) following the conclusion of Action No. 62. With respect thereto, the following is stated:

Background

De La Hunt was the winning bidder for Permit No. MM-FM418-A in FM Auction No. 70. Following the completion of the Auction, the FCC issued a *Public Notice*, which said in relevant part:

Where and How to File: Applicants must file accurate and complete FCC Form 301 applications electronically through the Media Bureau's Consolidated Database System (CDBS) online electronic filing system. In accordance with the Commission's rules, electronic filing of FCC Form 301 must be accompanied by the appropriate application filing fee, and information submitted on the new FCC Form 301 application by winning bidders must not constitute a major change from any information reported in the winning bidder's previously-filed short-form application (FCC Form 175).

Public Notice, DA 06-252 at 6 (footnotes omitted). As authority for this ostensibly required payment, the Commission provided a citation to *Implementation of Section 309(j) of the*

Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, 13 FCC Rcd 15920, 15984 ¶ 164 (1998). That paragraph states:

Long-form applications filed by winning bidders in broadcast auctions should include, if applicable, the exhibits required by the general Part 1 auction rules, and should be filed pursuant to the rules governing the relevant broadcast service and according to any procedures set out by public notice. The statutorily established application fees will apply to the long-form applications filed by winning bidders.

Id.

Following the announcement of the winner, De La Hunt submitted an application (FCC Form 301) as directed, and paid the requisite filing fee paid indicated by the CDBS Filing System.

On June 8, 2011, a request was filed with the Office of Managing Director for refund of the application filing fee pursuant to the provision of Sections 1.2107(c) and 1.1115(a) of the Commission's rules. That request was denied by Letter dated March 27, 2013 ("Letter").

QUESTION PRESENTED FOR REVIEW

1. Whether the FCC violated its own rules in requiring De La Hunt to submit a filing fee in conjunction with the permit acquired through its auction bidding system, and whether the FCC further violated its rules in refusing to issue a refund.

For the reasons shown below, the Managing Director's decision was in conflict with the Commission's regulations, and must be reversed.

ARGUMENT

No Filing Fee should actually have been assessed. At the time the application was filed, Section 1.2107(c) of the Commission's rules stated:

A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder. Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an

additional application filing fee with their long-form applications.

47 C.F.R. § 1.2107(c) (emphasis added). Therefore, even though Section 1.1104 of the Rules otherwise provides for the payment of an application filing fee, by its terms, Section 1.2107 of the Commission's rules specifically overrode that rule provision.

Moreover, when this rule provision was pointed out to the Managing Director, the Managing Director was required to issue a refund for the erroneously assessed fee. The rule regarding refunds of fees specifically states:

§ 1.1115 Return or refund of charges.

a) All refunds will be issued to the payer named in the appropriate block of the FCC Form 159. The full amount of any fee submitted will be returned or refunded, as appropriate, under the authority granted at §0.231.

(1) When no fee is required for the application or other filing. (See §1.1111).

47 C.F.R. § 1.1115(a) (emphasis added). Here, since no Filing Fee was required under the Commission's Rules in effect at that time, none should have been assessed, and it was appropriate that the application filing fee be refunded and returned.

The Managing Director's justification for refusing to refund the broadcast application filing fee does not pass muster. In *Amendment of Part I of the Commission's Rules – Competitive Bidding Procedures*, 13 FCC Rcd 374 (1997), the Commission adopted auction rules of general applicability. As the text states:

With some exceptions, we adopt our proposal in the Notice to apply the general competitive bidding rules adopted herein to all future auctions, regardless of whether service-specific auction rules have previously been adopted. Our Part 1 rules will apply to all auctionable services, unless we determine that with regard to particular matters the adoption of service-specific rules is warranted.

Id. at 382, ¶ 5. From the plain unambiguous language of the *Report and Order*, the Part I auction rules in 1997 were designed to apply to all future auctions, unless the Commission adopts a "service-specific" rule regarding the particular matter.

While it is true that “service-specific rules” were adopted for broadcast auctions in *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 13 FCC Rcd 15920 (1998), regardless of the text of the *Report and Order*, a simple review of Appendix C to the *Report and Order* shows that no “service-specific rule” was adopted with respect to the payment of broadcast application filing fees. *Report and Order*, 13 FCC Rcd 15920, 16028-16051 (1998). Moreover, even if the *Report and Order* had adopted such a provision regarding application filing fees (which it did not), that *Report and Order* in no manner amended Section 1.2107(c) of the Commission’s rules, which again, until recently amended, stated:

A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the “long-form application”) pursuant to the rules governing the service in which the applicant is the high bidder. Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications.

47 C.F.R. § 1.2107(c) (emphasis added). Therefore, even if a “service-specific rule” concerning the payment of broadcast application fees had been adopted at some point, until Section 1.2107(c) was amended (as it was for the first time in 2011), Section 1.2107(c) plainly controlled the situation concerning the requirement for payment of regulatory fees.

Finally, although the Commission amended its rules on June 20, 2011 (*Amendment of the Schedule of Application Fees Set Forth in Section 1.1102 through 1.1109 of the Commission’s Rules*, 26 FCC Rcd 9055 (2011)), the rule revision was not adopted until June 20, 2011, and not published in the Federal Register until June 28, 2011. As the item in the Federal Register states, the revised rule did not become effective until June 29, 2011. 76 Fed. Reg. 37661 (2011). The Commission’s recent revision of Section 1.2107(c) was not made retroactive, and generally newly adopted rules cannot arbitrarily be given retroactive effect.

A simple reading of the chronology of events demonstrates that as much as the Managing Director may wish to "turn back time" and would wish that it were otherwise, it was not permitted at that time under its own rules to assess application filing fees on winning broadcast auction applicants. Moreover, under any plain reading of the Commission's rules, the Media Bureau's *Public Notice* erroneously solicited and required the fees for winning applicants in Auction No. 70. However, notwithstanding the forgoing, the FCC is obligated to obey its own rules, and therefore, application filing fees improperly solicited may not, under the Commission's rules, be retained by the FCC, and they must be refunded.

WHEREFORE, it is respectfully requested that this Application for Review be granted.

Respectfully submitted,

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